

MAINE STATE HARNESS RACING COMMISSION
MINUTES OF MEETING
December 13, 2018

Gambling Control Board Conference Room
Department of Public Safety
45 Commerce Drive, Augusta, Maine
Starting Time 9:00 a.m.

Commission Members Present: Michael Timmons, Chair, William McFarland, and Michael Graham

Commission Members Absent: None.

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier, Miles Greenleaf, Jaime Wood, and Zachary Matzkin

1. Call the Meeting to Order and Introductions: Michael Timmons, Chair

2. Review and Approval of Minutes

Commissioner Graham made a motion to approve the minutes of September 19, 2018. Commissioner McFarland seconded. Vote 3-0.

Review and Approval of Decision and Orders

None.

3. Adjudicatory Hearings:

a. RE: Howard Davis, Jr. Mr. Davis is appealing the October 13, 2018 decision of Presiding Judge Charles Malia, at Scarborough Downs, to place the horse he was driving, "ThankYouAllMyFans" sixth for being inside the pylons. Howard Davis, Jr. was present and represented himself. AAG, Guay stated that Mr. Jennings will be representing Judge Malia. Mr. Jennings stated that is correct. AAG, Guay qualified the Commissioners. Commissioner Timmons stated that Mr. Davis is stabled at Cumberland Fairgrounds. Commissioner Graham stated that he was at the races. AAG, Guay asked both parties with the disclosure of both Commissioners if either party has any basis to ask for any withdrawal of either one of these Commissioners. Mr. Jennings and Mr. Davis both stated no. AAG, Guay stated that there was a request from Denise McNitt to allow for telephonic taking of testimony and the department essentially in an adjudicatory hearing what that means there was a motion to take telephonic testimony of a witness. The strong policy of this Commission has been not to allow telephone testimony of the fact witnesses. However, he's also aware that the Commission has also made a change in sort of its policy directive and as hearing officer he is going to be mindful of that over the next several months. Traditionally and historically to the extent that people were out of state because harness racing typically follows where the racing is or some people do, they would allow people to continue their case until such time that they were in the state. However, so as hearing officer he will announce sort of a change in his approach to these cases if they aren't going to be giving continuances to people; and we are going to have the cases heard in the winter when people are out of state that it's only fair that they relax the rule on live testimony and we allow people to testify via telephone. He did indicate to the person who had requested the ability to do this that anyone that testifies by telephone still has to meet all the same requirements as if they were here. Meaning their testimony needs to be relevant and moreover in this case specifically whoever is on the telephone will not be able to see the video tape so they can't testify about the video tape, that's called foundation. If somebody's going to testify about something that's being played today they have to have a foundation, they have to have the ability to see it to testify, so with that he did grant the motion. He anticipates that they will have a telephonic witness today. He is also letting the Commission know and the regulated industry as hearing officer given their no continuance stance for the winter, and the fact that people are out of state participating in harness racing in other states they will relax the rule on telephonic testimony. With that he asked Mr. Jennings if he had any exhibits he would like to enter. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing (2); Exhibit 2, Race Program; Exhibit 3, Notice of Judges Decision; Exhibit 4,

Judges Witness List; Exhibit 5, Appeal Form; Exhibit 6, Chapter 7, Section 4.10; Exhibit 7, Video of Race; Exhibit 8, Judges Daily Report; Exhibit 9, Notice of Fine for Mitchell Cushing; Exhibit 10, Judges Report to USTA; and Exhibit 11, Hearing Report Relative to Mr. Davis's Appeal. AAG, Guay asked Mr. Davis if he had any objection to the Commissioners receiving the exhibits. Mr. Davis stated no. Mr. Davis had no exhibits. AAG, Guay asked Mr. Jennings if he had any objection to the proceeding so far. Mr. Jennings stated no. AAG, Guay asked Mr. Davis if he had any objection to the proceeding so far. Mr. Davis stated no. AAG, Guay asked how they should proceed. Mr. Jennings asked if he would be allowed an opening statement. He also stated that this what he believes is an unusual case in front of the Commission in terms of an appeal. The reason he says that is because it is not just one thing that is in dispute that is easily reviewed and resolved by looking at the tape. What they have to be mindful of is that there were three horses that were placed, two of them were placed twice, and then there were three fines issued for this race as a discussion may reveal as we go along it's kind of a clinic for a judges practice session if you will. We need the judge to explain how you deal with a whole series of incidents and infractions in one race that lead to the final outcome that the judge. AAG, Guay stated what they will do and because of the nature of the hearing it's a de novo proceeding we will have Mr. Jennings go first, and then you can make your opening statement and you will have a witness come up and explain all of this. AAG, Guay asked Mr. Davis if he is just appealing one series of events. Is that correct. Mr. Davis stated not really. The whole outcome. AAG, Guay stated that you're appealing specifically the outcome. Were you a driver, owner, or trainer. Mr. Davis stated that he was a driver. AAG, Guay asked Mr. Davis if he is here challenging the placement of his horse. Is that correct. Mr. Davis stated yes. AAG, Guay stated the rule is that you can't bring in other cases into your case unless it's relevant. He also stated that each party will do their witnesses and then they will watch the video. Mr. Jennings stated that he would like to call Judge Charles Malia. AAG, Guay gave Mr. Malia his oath. Mr. Jennings asked Mr. Malia to explain his role in this particular race for the Commission. Mr. Malia stated on this day he was the presiding judge at Scarborough Downs race 10 on 10/13. It was a \$89,000 race for Maine Sire Stakes. Mr. Jennings asked Mr. Malia to go through the race as the judges saw it and explain the process the judges used to deal with the multiple incidents that occurred in the race, and how the judges went through and determined the appropriate way to respond to each. Mr. Malia stated the race was uneventful until at or near the 5/8 pole at which time the #5 horse Pembroke Pharaoh made a break at the 5/8 pole or just beyond it. At or near the 3/8 pole the #3 horse darts off the rail and drifts over into the rest of the field. At or near the 7/8 pole the #1A that's coming down off the turn, he engages #4 driven by Mr. Davis and he fouls him interferes with him moving that horse inside the pylons and he means inside the pylons completely. That's reviewable. The fourth incident that he's watching as they go across the wire is the #2 horse the winner of the race is in violation of the posture rule. He has 5 incidents in the back of his mind and writes them all down. At that point the starter calls him with 2 objections. One placed by Mr. Ron Cushing against the #3 horse who had drifted across the track and he says he was bothered by that horse. The second objection was placed by Mr. Davis against Mr. Mitchell Cushing for interference forcing him inside the pylons. The race has a celebration going on for the winner so he is waiting for television to show him anything. He noticed that the #5 horse who made the break at the 5/8 pole is on the board. Fortunately for him that's the first sequence anyway so he has to dismiss that or he has to do something about it. Fortunately, he has a good announcer so he asked him to make the announcement that there were multiple infractions in the race and that the #5 was the first one and he has to determine, a break is a violation, so he had to determine whether that break was caused by someone else or whether that break was causing an interference with someone else or whether that break was complied with as the horse lost ground. They reviewed that for a few minutes and the quality of the film was not very good. They determined that the horse complied and that's important because that horse is on the board. That means that all three numbers on the mutuels are correct which is a good thing for him because the mutuels are very important and that leaves him with violations that are not going to affect the three numbers on the board. He now looks at the #3 horse leaving the rail and drifting across the track, and he determined the horse may have marginally bothered horses but they all beat him. He dismissed that as quickly as he can because he has bigger fish to fry. Obviously leaving the rail needlessly is a violation. A serious one. He assigned a penalty of \$250 to that horse and driver. The next violation is an objection placed by Mr. Davis against Mr. Mitchell Cushing. Mr. Cushing, he had him on the phone after he talked to Mr. Davis who by the way is very understated and he was somewhat hyperbolic about this which is very unusual, and Mr. Cushing told him that Mr. Davis had seeded ground to him and was already inside the pylons and the film that he looked at dismissed that argument; and he assigned him a penalty for interference of \$200. Now comes by the way the last thing he is going to do on this particular race is to assign a penalty to the person who violated the posture rule. We had

six inquiries and two objections to deal with in the race. It took him 28 minutes to decide all this. Our pylon rule says that if in the opinion of the judges the person inside the pylon gains an advantage that horse can be fined or placed determined by the judges. Mr. Davis is inside the pylons horse and buggy for half of a turn and most of a straightaway not of his own bullsh. His question was did he attempt to extricate himself from that position or did he not because he's the better part of an eighth of a mile inside the pylons. When he fined Mr. Cushing for interfering with Mr. Davis he also placed him. Mr. Cushing finished 4th and was placed 5th for interference and Mr. Davis finished 5th and placed 4th. He still has the pylon rule in the back of his mind. He could have done nothing which to him would be a violation in and of itself because the 3 horses that Mr. Davis gained ground on behind him would have been here instead of Mr. Davis, so he placed Mr. Davis for being inside of the pylons and gaining ground on the horses that he defeated knowing full well that he did not go in there on his own. Our rule does not give us any disclaimer or latitude on that feature which has never happened to him before; and he's done some record with other judges and some judges say that he should have placed Mr. Davis last and Mr. Cushing behind him, and some judges say he got it right, and some say he should have taken things out of sequence and had a third placing, placing Mr. Cushing behind Mr. Davis for pushing him inside the pylons. He's giving them the investigatory work that he did after the race. He followed the Commission's rules and Mr. Davis was placed 6th. We had a hearing with Mr. Davis. Judge Malia explained the situation to Mr. Davis and he encouraged Mr. Davis to come here with this appeal. AAG, Guay asked Mr. Davis if he had any questions for Judge Malia. Mr. Davis had none. AAG, Guay asked the Commissioners if they had any questions for Judge Malia. Commissioner McFarland asked with respect to the distance that was traveled inside the pylons in his opinion was any attempt made to come back onto the course. Judge Malia stated in his opinion no but once Mr. Davis entered the straightaway he could see no egress for him. He could see one when it happened immediately but he thinks Mr. Davis was upset and drove his horse while he was inside the pylons. He doesn't believe he even knew where he was at that particular point. That's conjecture which he tries to stay away from in rulings. Mr. Davis told Judge Malia at the hearing that he had no place to go. Commissioner Timmons asked Judge Malia that he had a problem with Mr. Davis being inside the pylons but you also said the reason for him being in there was because he was forced there. Is that true? Judge Malia stated that Mr. Mitchell Cushing fouled him and he ended up inside the pylons. That was correct. Commissioner Timmons stated based on that he had placings but you're talking about placings to be on the inside the pylons but you don't see any placings here for an infraction or causing a person to be pushed in the first place. Judge Malia stated the first placings were for the foul the interference by Mr. Cushing. That's the first column on the program page. The second column is for the first placings when he placed Mr. Davis 4th and placed Mr. Mitchell Cushing 5th for the interference. The third column is the placings for Mr. Davis being inside the pylons. He replaced Mr. Mitchell Cushing finished 4th placed 5th placed back to 4th. The reason he did that is because Mr. Davis gained ground on Mr. Cushing even though Mr. Cushing put him where the advantage in his opinion advantage to Mr. Davis and disadvantage to everybody else. There was a fine to Mr. Cushing \$200 and he was placed. Commissioner McFarland is trying to understand this. It appears that by virtue of somebody creating interference and causing another violation of somebody else that it benefited them. Judge Malia stated correct. AAG, Guay stated as he understands and folks will forgive him if you already testified to this so if he looks at Mr. Davis' horse he actually crossed the line in 5th place. Is that correct? Judge Malia stated that he finished 5th. AAG, Guay stated as a result of the infraction of Mr. Cushing he got to move up one placing. Judge Malia stated that he reversed them. Mr. Cushing has to go behind Mr. Davis. AAG, Guay stated subsequent to that because his infraction he lost the 4th place and he was placed to 6th. Judge Malia stated that is correct and he explained. In many instances a horse who leaves the course or is even pushed off the course is placed last which is no longer in the race. He doesn't do that. He tries to ameliorate the situation and try to look at the chart and determine in his mind how much ground the horse gained and how much he beat the horses who are in proximity to him. Mr. Davis as you can see on the chart beat Mr. Ron Cushing by half a length. He was inside the pylons for the better part of an eighth of a mile. He walked the course, 18 inches outside the pylons and 18 inches inside the pylons roughly 50 feet. Mr. Davis unfortunately for him was far more than 18 inches inside the pylons. Usually people who are inside the pylons with wheels not with complete sulkies so he's trapped by our rule so he placed Mr. Davis behind the horse that was in very close proximity to him and behind him and the horse who was ahead of him he also gained ground on that horse sufficient place. AAG, Guay stated it sounds to him that there may not be disputes of facts here about the interference and the leaving the course but rather it's more of whether or not the proper analysis in application of the rules. Is that a fair statement? Judge Malia stated it is for him. AAG, Guay stated if you had applied a different order of analysis of the violations would it have resulted in a

different result in placements. Judge Malia stated yes. AAG, Guay asked Judge Malia to explain. Judge Malia stated they are taught as judges to take incidents sequentially first to last unless there was a lapped-on break at the wire by that he means a horse finishing makes a break and there are other horses lapped onto him by way of front to hind quarter. That would come first in placings no matter what else happens. That didn't happen here. He goes to sequence. The first sequence for him has to be the horse that breaks because he's on the mutuel board. Everything else he did sequentially. If he took them out of sequence which he doesn't think he is allowed to do and he placed Mr. Davis for being inside the pylons first rather than the foul, then the placings would have been Mr. Davis placed 6th and then Mr. Davis would be placed 5th and Mr. Mitchell Cushing would be placed 6th. AAG, Guay asked in his view had you apply a difference sequence and you feel you're compelled to follow the sequence but you acknowledged that a difference sequence would have resulted in a placement of one. Judge Malia stated that he gave him two other scenarios which he ruminated over. He asked Mr. Jennings if that's sort of the crux of this issue here for the Commissioners to decide. Mr. Jennings stated that he thinks it absolutely is. How do you apply the rules which don't have the level of clarity that all of us would prefer to a race in which multiply incidents and violations occurred and in which in his view 5 different placements occurred in so much as 3 different horses were placed and 2 of them were placed twice? AAG, Guay asked Judge Malia you were describing at the 5/8 pole where all of these various and that essentially what guided your order of analysis is that correct, other than the mutuel board where the event occurred on the track. Is that correct? Judge Malia stated yes. Thank God it was only for 4th or 5th place. AAG, Guay asked isn't it true though that to the extent that his violation occurred later in the race it almost has to to the extent that it was caused by a previous violation, so let's just use a hypothetical if somebody interferes at the half mile that causes someone to go off the course at the 5/8 mark they aren't going to go off prior to the interference; so if you apply that sort of geographic thing isn't the person that's potentially responding to the first thing going to then lose as appose to weighing did this violation cause this violation. If you purely apply it chronologically. Judge Malia stated that he did. The chronology of it is the interference caused the man to go inside the pylons so he has to deal with that violation first. The interference must be dealt with in his mind before he deals with the pylons. Now if he reversed them he would have a different result but he sees the causation here. He sees a cause and effect. The cause of him being inside the pylons is the interference and it must be dealt with first. AAG, Guay stated that the remedy follows if the remedy is based on the next transaction that you do he would think that if you apply that sequence, and if there is two violations then the person who's interfered with will always be the person who loses. Judge Malia stated that's if the violation was corrected and the second violation inside the pylons in his opinion wasn't corrected because the driver did not he saw no effort to get out of there. He's obliged to try to get out of there. AAG, Guay stated that his horrible hypothetical is wrong because had the driver that was interfered with in fact attempted to rectify the situation they would not have been in violation is that correct. Judge Malia stated yes. If you are knocked off the course you are obliged to get back on and the mitigating circumstance here is after a short period of time; and Mr. Davis would argue that there was no egress and this is something that he has never seen before and none of the judges he talked to have ever had it happen to them either. AAG, Guay asked Mr. Jennings if he had any questions. Mr. Jennings stated no. Mr. Davis had no questions for the judge. Commissioner Timmons asked if he could explain a situation where impeding another horse or forcing them off course need to be placed. Do you usually place them? How does that placement work. How do you decide rather he goes one place back or to the back of the bus? Judge Malia stated he determined by as he spoke to you he's walked the course and he knows the difference between being outside the pylons and inside the pylons is substantial. In this case, it wasn't feet it would have been yards. Commissioner Timmons asked his point was when the horse was interfered with by Mr. Mitchell Cushing what situation would it be that you'd just automatically place that horse back to the end. Judge Malia stated that horse would be placed behind any and all horses that he interfered with. Commissioner Timmons stated that he only interfered with that one horse. Judge Malia stated correct. AAG, Guay stated that there was a request that the witness would ask the hearing officer a question. He would be willing to hear the question and if he can't answer the question he would tell the judge that. Judge Malia stated that AAG, Guay mentioned a phone call from Denise McNitt but he didn't hear him. AAG, Guay reiterated what he said earlier in the hearing. There were no other witnesses. He gave Mr. Davis his oath. Mr. Davis testified. He stated that he was interfered with. He was pushed inside the pylons to avoid an accident and somehow, he's having trouble understanding. He's interfered with and he gets placed out of the money, and that a coupled entry one of them interfered with him and they were placed ahead of him and he doesn't understand it. There are rules in a lot of states if you're interfered with and pushed in there that horse is never getting placed ahead of you. And a coupled entry neither one is getting placed ahead of you.

AAG, Guay stated it sounds like there's not a question of what happened during the race but rather what happened when the judges were making their decision. Did you hear anything Mr. Malia said that you disagreed with in terms of what happened on the track? Mr. Davis stated that he thinks Judge Malia did everything right that happened on the track. The problem is the rule the way it's written there's no for interference. AAG, Guay stated if there's no dispute of what happened on the track do we need to watch the video. He asked Mr. Jennings if he had any questions for Mr. Davis. Mr. Jennings stated that Judge Malia asserted at the point of which Mr. Davis was forced off the course there was a brief window in the judges view in which he could have returned to the course. He hasn't heard Mr. Davis speak to that question. Mr. Jennings asked Mr. Davis if he believed he had an opportunity immediately upon being forced inside the pylons to return to the course. Mr. Davis stated he most definitely didn't and when we watch this tape he's going to show you that Mr. Cushing was adamant about interfering with him keeping him there and that Mr. Cushing was inside the pylons. AAG, Guay stated that they are going to watch the tape. There was no agreement. They do have a disputed fact. He stated that they would call this a joint exhibit and since the state has to prove that the judge's decision is correct, he'd like Judge Malia to first make the comments on the video tape when we watch it. Judge Malia explained what was happening on the video tape. Just for aside Mr. Davis referenced coupled entries. Coupled entries only effect the mutuels they do not affect the minor placings. They are only coupled to protect the public and the public was protected. AAG, Guay stated that he believes the issue is whether or not Mr. Davis could have returned to the track. He stated to Judge Malia that his testimony is that that horse could have returned to the field. Judge Malia stated his testimony is that that horse gained an advantage on the other horses unwillingly. He didn't do it willingly but he gained ground on the other horses. AAG, Guay stated that he's asking these questions because he's trying to identify what the issue the Commissioners need to decide. What you are saying is because he gained ground. AAG, Guay thought and he thought Mr. Jennings said as well that he thought he heard you say the issue is whether or not the horse could return, and if he returned to the field as fast as he could have you would not have assigned a penalty. Judge Malia stated that when a horse off the course he's not running 5,280 feet like the other horses are. AAG, Guay stated that he understood that but he indicated that there would not be a violation if he felt that the horse had attempted to get back at its earliest convenience. Judge Malia stated that if the horse had gotten back onto the course with any degree of urgency which he sees none that would have been a different ballgame. AAG, Guay stated that his testimony is that video tape shows a lack of urgency by Mr. Davis's horse to get back on the field. Judge Malia stated which is understandable but he's not seeking an egress. He's off the course and he doesn't seek an egress and whether or not he can is an open question. AAG, Guay state that there is a lot going on in this race. Commissioner McFarland stated it would have been really nice to have the backstretch camera at this point that worked so you could see it from that angle. It is so far away to look at. You can't even see the pylons. Judge Malia stated that's a problem for all of us because you have the euro rail there as well but you can see on the turns he can see very well. Commissioner McFarland asked if the backstretch camera was working this day. Judge Malia stated yes. He used it to when he made his decision. AAG, Guay asked if they could have Mr. Davis give his view of the race. Mr. Davis gave his view of the race. He was just forced inside the pylons or get into an accident. As far as being on the inside on this day he didn't gain an advantage because there was 4 inches of mud. He had no choice. He's done this for a long time. He couldn't get out because Mr. Cushing was beside him. AAG, Guay asked the Commissioner's if they had any questions. Commissioner Timmons asked Judge Malia that Mr. Davis wasn't the only one inside the pylons. Judge Malia stated that was part of the interference. Commissioner Timmons stated that he interfered and drove the person off course and even when the man was in beside him he was inside the pylons with his wheels in a different place then where he actually interfered with him in the first place. Is that true? Judge Malia stated no he wouldn't say that. The interference was still going on when he's inside the pylons. Commissioner Timmons asked after they turned at the 5/8 coming down the stretch he was still beside of him. Was Mr. Cushing inside the pylons. Judge Malia stated that he had a wheel inside the pylons. Commissioner Timmons stated he thinks that's critical. Judge Malia stated that he's not gaining an advantage for himself at that point he's fouling this man which he finds a placement for him. He understands what you're saying but being inside of a pylon and gaining no advantage other than the interference he usually makes a judgement as to whether there's an advantage gained as you can see in your rule on the pylon rule basically it leaves a lot to the judge's opinion. Commissioner Timmons stated that he agrees but his point being after the initial interference did the interference last for a long period of time while the other man was on the inside, and it appeared to him that they said why didn't he get back on course when that man not only is still beside of him he even down the stretch had a wheel inside the pylon. Judge Malia stated that he doesn't disagree with what you're saying

and perhaps he could have been more draconic towards Mr. Cushing, but it still begs the question that Mr. Davis gained ground perhaps obviously unwillingly. If you get pushed inside the bank vault and you decide to take the money while you're in there, you didn't win willingly but you participated in there. It's a confusing issue. He could have left this alone and then been here with the other participants who he gained ground on and he chose this way. Commissioner Graham stated the only issue he has he thinks Mr. Davis was very definitely inside the pylons he was forced in there but he doesn't think he should have got placed up. He has a real problem with Mr. Cushing the 1 and 1A both being in ahead of him they both should have been behind him. Judge Malia stated that he understands but he's responsible for coupling of horses and the rule is very clear the coupling of horses is to protect the betting public and the betting public was not effected here at all. Commissioner Graham stated that he disagrees with him completely, so you're saying if he's another owner in the race and the guy interferes to keep his horse from getting in there to get a 4th or a 5th for \$50,000 it doesn't count that's not right. He doesn't believe the rule says that. Judge Malia stated that it does. Unfortunately, if this was a non-betting race he couldn't have coupled any horses. If this was a non-betting race the USTA system doesn't even allow him to couple the horses so, he understands what he's saying but if you take A plus B equals C the USTA is telling you no to your answer. Our rules are specific. Your logic is correct but it specifically says in our rules and the USTA rules coupling of horses is only to protect the betting public and the pari-mutuels. AAG, Guay asked if there were any other questions for Commissioners. Is there any other testimony by anybody? Mr. Jennings asked about the email. AAG, Guay asked from Denise McNitt. He doesn't know how she fits in this. He stated to Mr. Jennings that he granted a motion to allow telephonic testimony. It's ok to have a witness by telephone but somebody has to call the witness. Mr. Jennings stated that as a matter of procedure do they need to allow someone else who could be effected by the outcome of this proceeding an opportunity. AAG, Guay stated that Mr. Jennings is asking him to give legal advice to the Commission on whether or not they can continue to proceed in this case. He understands the witness was for a party but they are a party. Mr. Jennings stated that they have a notice of hearing. Mitchell Cushing who is involved in interference and placement got a notice. AAG, Guay stated there is a notice of hearing for Mitchell Cushing. He gave Mr. Jennings his oath. He asked questions of Mr. Jennings. Mr. Jennings stated that Mr. Cushing received notice of the hearing for the desire to have telephonic testimony, and it was filed by Denise McNitt. She is the owner of two horses in the race. AAG, Guay stated in relation to Mitchell Cushing was she the owner of the horse that Mr. Mitchell Cushing received the notice for. Mr. Jennings stated yes. AAG, Guay stated just to be clear for the record they received a request within this proceeding by the owner of the horse in relation to the notice of hearing that had been served on Mr. Mitchell Cushing. Mr. Jennings stated correct. AAG, Guay stated specifically he is going to allow the record to remain open for him to supplement the record. It's not relevant for fact finding. It's relative for procedural. He will allow the record to be opened for an additional two days. The Commissioner's don't need this to make their decision. He will let Mr. Jennings supplement the record with the email and mark the email as exhibit 12. He asked Mr. Davis if he objects that he would leave the record open for an additional two days in order for Mr. Jennings to submit an email by Denise McNitt to supplement the record. Mr. Davis stated he is having a little trouble because they were notified of the hearing and he drove 9 or 10 hours to get here. AAG, Guay stated that he is going to suggest to him if he is going to object to it, it's going to hurt your case but he can do whatever he wants. Mr. Davis stated why couldn't she drive here. AAG, Guay stated that he is going to take that as an objection so he would not let the evidence in and continue the hearing. Mr. Davis said that was fine. AAG, Guay asked Mr. Davis if he objects. Mr. Davis stated no he does not object. AAG, Guay stated to Mr. Jennings the department will submit the email which is written documentation is sufficient to show that Mr. Mitchell Cushing was aware of the hearing. On that basis, he will not continue the hearing they will deliberate today. Is there any objection to that ruling? Judge Malia stated that he does. For this reason, he does not see her name on any of these horses on the program. Somebody stated that she is an owner of the horse. That's an abyss with quicksand at the bottom of it. AAG, Guay stated it's his understanding that the judge despite the position of the department is objecting to continuing this proceeding and their deliberations of this proceeding today. Judge Malia stated that he withdraws his statement. AAG, Guay stated that they have a party that drove 9 hours from Delaware and he is very leaning that for whatever thin possibility that the other party was not aware of this it would be unfair to Mr. Davis who did in fact drive up if they were to continue this into next month. Because of that he thinks there is sufficient basis based on the email which will be supplemented into the record to show that Mr. Cushing was aware of this hearing. Is anyone here representing Mr. Cushing. He saw none. To the extent that Mr. Cushing subsequently disagrees with his ruling he can file an appeal. With that even though there's no objection he would be able to file an appeal. Mr. Jennings stated that he

just wants to make sure that he's not making a mistake here. We have a request via email for telephonic testimony presumably on behalf of Mitchell Cushing. AAG, Guay asked if he would like to call that witness. Mr. Jennings stated no he does not have a need to call the witness but how do they address that request. AAG, Guay stated that he granted the motion but someone has to be here to call the witness. He stated that he did not schedule that person for testimony. Mr. Jennings stated that he thinks they're done now. AAG, Guay stated that this has been a very unusual case. His ruling is that they are going to deliberate and if the party that is not here wishes to appeal the record is sufficient subsequent to the admission of the email that Mr. Jennings is going to put in. He asked for closing argument. Mr. Jennings stated that if the Commissioners sit there in their role as judges they may conclude based on a matter of principle or fairness that certain outcome is desirable. Judge Malia made his ruling based on his best understanding of the procedure he used and the precise text contained in Section 54.1.O to the best of his ability over time. AAG, Guay asked Mr. Davis if he had any closing statement. Mr. Davis stated that he just wants to be treated fairly. When you get interfered with you don't get punished. He spends a lot of time raising these colts. AAG, Guay asked Mr. Jennings if he would. Mr. Jennings stated that Mitchell Cushing is on the phone. AAG, Guay gave Miles Greenleaf his oath. He asked questions of Mr. Greenleaf. Mr. Mitchell Cushing called into the proceeding. AAG, Guay gave Mr. Cushing his oath by telephone. There were no objections to the proceeding up to this point by Mr. Cushing. Mr. Mitchell Cushing gave his view of the race. He stated that the option to not come back on the track seems kind of odd to him because there's pylons and there's nothing saying that he couldn't come back on the track. The part that's funny to him is very clear that if you watch the video that driver especially if you watch his left hand he never made any attempt whatsoever to slow his horse down. He actually encouraged his horse onward on the left side of the pylons which is off the course. As the rule reads when you go off course you have to make some type of an effort to work your way back on the course by losing ground and it's not his job to help the person back on the course. He was saying that he was not being allowed back on. That's kind of where the rule is. AAG, Guay asked Mr. Cushing if he could site what rule says that a person that's off course has to lose ground. Off the top of your head do you know what rule that is. You testified to that. Mr. Cushing stated there was no other issues in the race. AAG, Guay closed the hearing for deliberations. Commissioner Timmons asked either Commissioner if they wanted to make any comments first. Commissioner Graham stated that the judge was put in an extremely difficult position. He thinks he probably made the best judgement that he could although he disagrees with some of his decision but he thinks he's going to support him even though he disagrees. Commissioner Timmons asked if he had any other specifics that you want when it comes to the rule. Commissioner Graham stated that he thinks that very obviously the leaving the course rule Mr. Davis left the course and gained an advantage while he was outside the course. That he thinks is very definitely so that to him means he should be set back but he also has a problem with Mr. Cushing forcing him off the course and being allowed to be put in front of him because he was the one that started the whole thing. Commissioner McFarland stated that he agrees with what Commissioner Graham has said up to this point. First of all, he wants to say this was a tough judge's decision to have to make. He can now understand why it took the amount of time it did to sort that one race out. He commends Judge Malia on his decision of the circumstances. You may have made a difference decision; however, you followed the chronological events and in his experience in other hobbies he has had in the past as far as following rules that's how you do it. You take the first violation and level the penalty and so on. With reference to our rules you follow them to the best of your knowledge and experience however he has a real problem with the fairness part of it with respect to this being kind of a precedence setting thing unless we change the rules or change this specific rule in the future somewhat maybe tweak it in some way because he finds it discouraging that one person can create a violation that forces somebody in this case off the racetrack and end up ultimately because of the two rules benefiting with respect to placement because there were multiple infractions that's the real problem in his opinion and it makes it very difficult to rule on in that respect. Commissioner Timmons stated that it was certainly difficult and difficult to sort out and to come to the conclusion that it did is pretty bad to vote against something when they follow the rules and do what they're really supposed to. He sits here and feel that the fairness of it and the fact that the individual that actually started that by forcing Mr. Davis off course that was wrong going on the inside of the pylons longer than they should that was wrong and the fact that we have rules and they follow the rules and then we're going to say if I support it he supporting what he doesn't feel is fair he just feels the placing on this he knows the individual was fined; however he's not going to follow the judges. He's going to vote against this because of watching the gentlemen say and watching him down the stretch there wasn't an opportunity for him to come in when the other person's wheel was still inside the pylons. His wheel was inside the pylons and so was him. He fined him for being inside the pylons

but if you watch that real close where was Mr. Cushing's wheel over the pylons how far down the stretch was Mr. Cushing's wheel over the pylon which meant he wouldn't be able to get in there but he pushed him out there in the first place and he wasn't going to help him which he just said in his testimony. Right now, unless he hears something from either Commissioner that would change his mind he's going to vote against the judges and that's totally out of his first thought. Commissioner McFarland asked Commissioner Timmons how he would remedy if in fact that is your position how would you remedy the final results. Commissioner Timmons stated that you've got to change the rule. AAG, Guay stated what he thinks he is saying is if you disagree with the judge's decision what would the placement be for Mr. Davis. Commissioner Timmons stated that if he was the judge he would have the tendency to place Mr. Cushing at the end and maybe he would have been next to it. AAG, Guay stated that when you vote they need to know what the orders going to say what the placements are going to be. You might be the only one and we might not get there because if there's two votes to maintain the judge's ruling then it doesn't matter. Commissioner McFarland stated that it's a bad precedent. He's looking at the rule at what interference says. Forcing another party off the racetrack or beyond the pylons. Nothing else is a result of all of this. It's one thing to have interference out on the track and it stays on the track now when the interference is creating a cause and effect of leaving the track in his opinion is more serious. The bad precedence is he's a driver and he decides he doesn't like somebody he just force him off the track and I'll get a \$200 fine and he'll go on and get placed where he gets placed and he just thinks that's a very bad set of circumstance to put harness racing into on the racetrack; as far as what the remedy is in this particular situation he's about fairness. There is nothing in this rule that talks about losing ground. He thinks the judge in realizing there's a lot going on at that time. He's getting back to the fairness himself. He thinks this Commission as they currently are if they uphold the judge's decision in this case they are encouraging drivers in some respect that they don't have an obligation to race professionally and not take out whatever bitterness out there on the racetrack where it involves humans and animals. He doesn't think as a Commission they can encourage something like that so based on that it would be his recommendation that they "thankyouallmyfans" finished 5th placed 1st as a result of the interference which lasted and continued through the race and 1A finished 4th placed 5th and the 1 horse was 6th and he would stand with that first positioning of those horses. Commissioner McFarland made a motion to grant the appeal and that they follow the judge's decision for the violation of interference in the race which would put the 1A horse finishing 4th placed 5th for interference and the 4 horse which finished 5th would be placed 4th for the continued interference in the race and the 1 horse would remain in 6th place. Commissioner Timmons seconded. AAG, Guay stated that there needs to be a legal rational. Do you find a violation that Mr. Davis left the course or that you find there's no violation of leaving the course because he didn't gain an unfair advantage or are you saying that you want to change the decision because the interference was continuing through the race? Was it both or is it either of those? He kind of heard a both in your statement Commissioner McFarland. You need to have a legal basis why you're going to because the judges first of all need to know what you're saying they needed to do differently. AAG, Guay stated to Commissioner McFarland was it that Mr. Davis didn't get an unfair advantage by leaving the course is that your rational. Commissioner McFarland stated no. AAG, Guay asked is it because of the continuing nature of the interference by Mr. Cushing's horse. Commissioner McFarland stated absolutely, yes. AAG, Guay stated and that the continuing interference then changed the sequence. Is that correct. Commissioner McFarland stated it left the sequence as the judge first found it. AAG, Guay asked Judge Malia if that was clear enough for him. Judge Malia stated yes. Commissioner Timmons asked for any discussion. Commissioner Graham stated that he disagreed with it. He is going to stick with the judge's decision the way he did it. Commissioner Timmons asked for a vote. Vote 2-1. Commissioner Graham opposed.

4. **Approval of the 2019 Sire Stakes Schedule.** CMR 01-017, Chapter 9, Section 1.3 requires the Commission to approve the annual sire stakes schedule. The Sire Stakes Advisory Committee has developed a proposed 2019 schedule. The Commission will review the proposed schedule and determine whether to approve it or amend it. Commissioner Timmons asked Mr. Jennings if he had an update on Northern Maine. Mr. Jennings stated that their board meets tonight and they're going to vote on rather to submit an application and make a request to open the race date hearing. He's been working with Northern Maine and Bangor and if Northern Maine is going to race they would have overlapped two days with Bangor. He stated that the initial request from Northern Maine Fair is whether or not Bangor would be willing to relinquish July 2nd and 3rd and Bangor could choose from a variety of different openings in the schedule where they might move those dates. Mr. Hopkins worked with his management team and they had a degree of reluctant to relinquish both of those dates, so they graciously agreed to give up one of the two days. They left that choice of to Northern

Maine. Bangor would relinquish July 2nd and Northern Maine Fair would run a 4-day week which would start June 29th through July 2nd. AAG, Guay asked Mr. Jennings that when you put the notice out instead of having to call Mark Randlett back in if people could waive him as being the hearing officer for the reopening of that race date hearing. Mr. Jennings stated that they will have a couple of other house keeping things to do. Scarborough forgot to put in for makeup dates and Topsham that they would like to switch a day. Commissioner Timmons stated that he doesn't hear any objections. Mr. Jennings stated that he doesn't know how we're going to proceed with the sire stakes schedule. AAG, Guay stated that there's no time limit in the rules that's how he reads it. Mr. Jennings stated correct. Commissioner Graham stated that he thinks it would be in their best interest to wait until we know about Northern Maine Fair and he has a problem with the schedule that they came up with. Mr. Jennings stated that you as the Commission make the decision. All they can do is made a recommendation. AAG, Guay stated the rules says "the Commission shall establish a schedule of races and select the sites of the events annually." He stated that there's no reason not to defer the decision from today that he sees in the rule. Mr. Sweeney stated that the Sire Stakes Advisory Committee has not formally met since the last meeting. They have come to a consensus of things that they were ready to offer that might address the concerns the Commission had at the last meeting. The first dealt with the Northern Maine Fair. Now that they know what Northern Maine Fair may be applying for it makes it easier and harder at the same time. The other issue dealt with Topsham week. If they move the 3 year old trotters to August 7th at Topsham that would keep the trotters on a Wednesday schedule which is one of the things that the Sire Stakes Advisory Committee endeavored to do so they weren't jumping from day to day. If they do those things and change the 3 year old pacers from Scarborough to Northern Maine Fair if they move the beginning of the Sire Stakes season from June 26 to June 25th at Bangor and then move the 3 year old trotters 2nd leg to July 2nd at Northern Maine Fair they've answered all concerns of the Commission at the last meeting. Commissioner McFarland stated that's only contingent on the fact tonight they vote to have harness racing. If they decide they don't everything can stay the same. Mr. Sweeney stated that you could schedule the beginning of the 3 year old trotter season on June 25th rather than June 26 and if Northern Maine doesn't race they go to Bangor and likewise on June 29th the 3 year old pacers if Northern Maine doesn't race they can go to Scarborough. Commissioner Timmons stated they don't need to take a separate vote on that right this minute. Mr. Jennings stated that Topsham intend to race provided the Commission is able to get to them some financial support. It's kind of contingent on that. At this point they intend to race. Mr. Sweeney asked Mr. Jennings that he stated that Topsham was considering moving a date. Do you know what date that is? Mr. Jennings stated he would check his email. Commissioner Graham stated that he is concerned about the schedule effecting the fairs. On Wednesday, you have stake races so on Wednesday you're going to have tons of horses because any trainer's going to go where stake races and throw in a couple more horses. Let's say on Thursday no horses racing in stake races because of Plainridge so all your good drivers are at Plainridge your horsemen are going to be sending their horses to Plainridge if they're competitive. We're supposed to be helping the fairs and he's concerned with this schedule we've got is going to hurt the fairs. Mr. Sweeney stated that that's an issue every association has to face and he having worked in race offices in the past he knows it's a struggle. Race secretaries have to look at their available horse supply and try to write conditions that will encourage horses to race at their venue. The overriding question he thinks has to be what is the will of the industry at this point. Do we want to try to accommodate the trainers and drivers? Do we want to try to accommodate the fairs? Do we want to try to do what's best for the sire stakes schedule? He thinks the answer has to be a little bit of everything. He thinks we'd get bogged down just worrying about whether or not a certain fair is going to have horses on Thursday because Plainridge Race Course is racing on a Thursday that's a problem we really can't solve. Commissioner Timmons stated that they have some issues that are coming up. They have to found out about their race dates. We have to open the race date hearings to award those dates and they have to have the dates before you can decide what days you can go up there. We can't really do anything about it until we get A and B taken care of. You said you didn't have any meetings since we met the last time as a committee. He hasn't seen Ms. Ireland here as the leader of the sire stakes so next time we meet we should be able to finalize the thing and vote on it. Mr. Sweeney stated that's a noble goal. Mr. Jennings stated that he thinks you're asking to table item 4. Commissioner Timmons stated that they can't approve it yet. He asked Mr. Sweeney if he is here today asking them to approve your schedule. Mr. Sweeney stated that he's here in response to an agenda item that the Commission put on their agenda. You are charged with approving the schedule. Commissioner Timmons stated that he understands that but is that what you expected today was to have it approved. Mr. Sweeney stated absolutely. Commissioner Timmons stated the way it is. AAG, Guay asked if they have a document. Mr. Sweeney stated that they presented a document at the last meeting. They have made

recommendations for changes to the schedule that answered the concerns of the Commission gave him at the last meeting. They fully expected that they would have a sire stakes schedule as they came out of this meeting. Tracks need to start planning and there are international staking calendars and organizations that are going to be publishing documents. Maine's going to be left off those documents if they don't make a decision. AAG, Guay asked Mr. Sweeney if he is proposing two options. One if they move forward the Northern Maine Fair and so the Commission would vote and approve two schedules, and then one is contingent on this and one is contingent; one is yes and one is no on the vote tonight but all of it contingent upon the Commission reopening the race date hearing and granting dates. With all those qualifiers that's what you're asking the Commission to do. Mr. Sweeney stated absolutely. He would like the Commission to take the schedule that the Sire Stakes Advisory Committee presented at the last meeting and make the changes that they just talked about, and the only wild card at that point would be whether or not Northern Maine raced. The day would stay the same. The 3 year old trotters would still race on June 25th. If Northern Maine raced they would race at Northern Maine. If Northern Maine did not race they would race at Bangor Raceway. If you take the schedule that we gave you and the changes that they are recommending would be on June 25th 3 year old trotters would race at Bangor. Then they would come back on July 2nd either at Northern Maine or at Bangor depending on whether Northern Maine races. Then on June 29th the 3 year old pacers would race at Northern Maine depending on if they race if not they will race at Scarborough. Then the 3 year old trotters would go to Topsham on July 7th instead of Scarborough on July 4th. Ms. Perkins stated that she agrees with this schedule but she wanted to say at the Sire Stakes Advisory meeting they discussed Northern Maine was going to race. They do want to race at Northern Maine. Commissioner Timmons stated that if what you're saying is that you approve of the schedule that you've presented last month and you've come back now and satisfied that if this board can vote for that you want it done today. Ms. Perkins stated correct. Commissioner Graham stated that he's real concerned that they are going to see fairs struggling desperately on days there's no stakes races. Commissioner McFarland agreed. He can go along with this schedule for this year but he thinks we should take a long hard look at it as it progresses through the season especially on Mondays and Thursdays when they would be competing south of the border. Commissioner Timmons asked for a motion. Commissioner McFarland made a motion to adopt the Sire Stakes schedule as it has been proposed and amended here today. Commissioner Graham seconded. Vote 3-0. AAG, Guay stated just to be clear that the amended would take effect if Northern Maine races if not then they would go with the original schedule.

5. **Final Adoption of Amendments to CMR 01-017, Chapter 7.** On August 1, 2018, a Notice of Agency Rulemaking Proposal was published in Maine's five daily newspapers, which began the comment period on proposed amendments to Chapter 7 of the Commission rules. A public hearing was held on August 22, 2018 and the deadline for written comments ended at the close of business on September 7, 2018. The Commission reviewed the comments for Chapter 7 and has worked on language refinement at three separate meetings. It will now consider whether to finally adopt the amended rule, the response to comments, the basis statement and the statement of impact on small businesses. Commissioner Timmons asked for a motion. Commissioner McFarland made a motion to adopt the following to the amended Chapter 7, the response to comments, the basis statement, and the statement of impact on small business. Commissioner Graham seconded. Vote 3-0.
6. **Overview/Update of 2018 Prohibited Substances Positive Tests.** Miles Greenleaf will give an overview/update of the prohibited substance positive test results that have been reported for the 2018 race season. Mr. Greenleaf stated there are no updates on the drug cases. Mr. Jennings stated that this will be on the agenda just so any time there is something to report they will report.
7. **Other Business**
 - a. **2019 Officials Training?**
Commissioner Timmons asked what is the 2019 Officials Training. Mr. Jennings stated he was bringing back this item on the agenda that you asked for. He believes what his sentiment was that training for officials should be repeated in 2019 even though the rule says it only has to be done every other year. That was a request that you made and we are trying to find out what you think. Commissioner Timmons stated they are going to need training even with 30 years of experience you can get in a situation that makes you feel uncomfortable even though you did the best job you could do. He likes to always be able to sit here and

support what officials do, what the vets do, and what the people do. He likes to support the industry. This is one aspect that we need to give some more emphasis on is the officials. Mr. Jennings agreed so he will endeavor to set up a training for when the judges return from Florida.

b. Reconsideration of Membership in the Association of Racing Officials International

Mr. Jennings stated that you need to vote on whether or not you want to become a member of the ARCI. He believes the membership is around \$3,600 for calendar year 2019. Commissioner Timmons asked Mr. Jennings what his recommendation was. Mr. Jennings stated that he is caught in the middle. Commissioner Graham stated that he would be in favor of voting for it for the year 2019. Commissioner McFarland concurred with Commissioner Graham. Dr. Matzkin stated that it gets us a seat at the table which we really haven't taken advantage of to participate in the things that they do. Commissioner Timmons asked for a motion. Commissioner Graham made a motion to vote to join the ARCI for 2019. Commissioner McFarland seconded the motion and make the following amendment to get more involved in what they offer. Vote 3-0.

8. Public Comment

Commissioner Timmons asked for public comment. Ms. Perkins stated that she can remember every year or every other year they always had an officials school and it was held at the Senator. Sometimes it was even two days. She would suggest that you might go to Massachusetts or some other state and ask for them to co-sponsor something and come to Maine to do this. You've got to draw on more people.

9. Schedule of Future Meetings:

January 18, 2019

10. Adjourn

12:10 p.m.